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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY WOODS,

Defendant and Appellant.

D054822

(Super. Ct. No. SCE284840)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed.

Timothy Woods was charged with robbery, burglary, and petty theft with a prior theft-related conviction. He was convicted of robbery, acquitted of burglary, and the petty theft charge was dismissed. He contends the robbery conviction must be reversed because (1) there were references to his criminal background during trial testimony, and (2) there is insufficient evidence to establish he had the intent to permanently deprive the victim of his property. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of the offense victim Kevin Workman was the caretaker of a closed church in Lakeside; he lived in an apartment located on the fenced-in church property. Workman and Woods had been friends for a couple of years. At about 5:30 p.m. on October 13, 2008, Woods broke the sliding glass door to Workman's apartment and entered the apartment. Workman, who was in the bathroom, heard the glass breaking. When Workman went into the living room, he saw Woods standing there holding Woods's skateboard. Woods, who had been drinking, was "ranting and raving" and yelling about a mutual friend named Sara, asking where Sara was. Woods appeared angry because he was not able to find Sara.

Workman's bicycle was leaning up against his living room couch. Shortly after his entry into the residence, Woods grabbed the bicycle and went out the sliding glass door.

When Woods left the apartment, Workman called 911. Workman told the 911 operator that Woods had broken into his home by shattering his sliding glass door; Woods had swung "his skateboard around, breaking things"; and Woods had threatened him and taken his bicycle. Narrating to the operator what was occurring, Workman stated that Woods was heading out across the back field and was "trying to steal [his] bike." Workman reported that Woods was now standing at the gate to the property screaming at Workman to open the gate, and that Woods wanted to hit him.

While still talking on the phone with the 911 operator, Workman (who had come outside) approached Woods at the gate that enclosed the church property. On the tape of the 911 call, Workman is heard telling Woods, "I'm getting the gate. . . . [¶] . . . Leave

my bike." Woods responded, "I will. Open the gate." Woods then asked, "Who you calling Kevin?" Workman responded, "I'm calling friends to come help me." Workman then told the 911 operator, "Now he's taking my bike." Workman testified that during this interaction at the gate, Woods "screamed [and] yelled" at him and was agitated.

When Workman spoke to a deputy sheriff on the day of the offense, he indicated that he had been afraid during the incident. Deputy Sheriff Aloha Bona testified that Workman said Woods chased him around while swinging the skateboard, stating, "Do you want some of this?" Further, Workman told Bona that he left his residence because he was afraid for his safety. In contrast, on January 21, 2009, about three months after the incident, Workman told an investigator from the district attorney's office that although Woods was waving the skateboard while his hand was on the bicycle, he had not been afraid of Woods.

At trial, Workman testified that in his view the case was "overblown" and the district attorney had "overcharged" the case. Workman stated that Woods did not swing the skateboard at him, challenge him to a fight, or chase after him.¹ Workman felt threatened by Woods's breaking of the sliding glass door and entry into his apartment, but he did not feel threatened by Woods swinging the skateboard. Workman did not think Woods came to his residence with the intent to rob him or steal his bike, but rather he came there to try to find Sara and then he took the bike as a means of transportation when

¹ When asked by the prosecutor if he told Deputy Bona that Woods said "[d]o you want some of this?" as he was swinging his skateboard, Workman responded that he vaguely recalled this, but it was "all in a matter of seconds and [Woods] was out the door."

he was leaving. Workman acknowledged that when he called 911, he believed Woods was trying to steal his bike. Workman stated that he did not try to grab the bicycle back from Woods because there "probably would have been an altercation," given that Woods had been drinking and was agitated. However, Workman did confront Woods by asking him not to take the bike because it was Workman's only means of transportation.

Workman testified that he had about eight bikes at his residence, and he had let Woods borrow a bike a couple of times in the past year when he lived at another location. When questioned by the prosecutor, Workman acknowledged that Woods would generally talk to him first before borrowing a bike, stating that he wanted to use the bike, and Workman would let him. Woods had never before broken down a door or window to get to a bike. However, on a previous occasion Woods had taken a bike without first asking Workman. Workman explained that before living at the church, he used to be homeless and he had about three bikes at the property where he was staying. Woods would ask before taking a bike if Workman was at the property at the time, but he had also taken a bike when Workman was not there. Workman stated that on these previous occasions Woods was not trying to keep the bikes but was using them temporarily. Workman would get the bikes back eventually either by Woods returning the bike after a couple of days, or by Workman retrieving it about a week later after "hunt[ing] it back down" and finding it where Woods had left it at someone's house. Regarding the October 13 taking of his bike, Workman testified that he "could [not] say" whether at the time of the 911 call he thought Woods intended to return the bike, explaining: "I wasn't really thinking of that at that second as much as he was leaving with it."

Workman testified that his other bikes were broken and he wanted the bike taken by Woods on October 13 because he needed it for transportation. He borrowed another bike during the weeks his bike was missing. Workman thought Woods was staying with his parents in Santee, but he did not know where their house was. However, Workman was able to contact Woods's parents through Woods's sister. About two weeks after Woods took the bike, Workman saw Woods's parents and spoke to them. The next day, Woods's parents brought Workman his bike.

Jury's Verdict and Sentence

Woods was charged with robbery, burglary (entry with intent to commit theft), and petty theft with a prior theft-related conviction. For the latter charge, the trial court bifurcated trial of the prior theft-related conviction so the jury was not apprised of the prior conviction.

In closing arguments to the jury, defense counsel argued that Woods did not commit burglary because he did not intend to steal when he entered the residence; he did not commit robbery because he did not use fear to take the bicycle and did not intend to permanently deprive Workman of the bicycle; and he likewise did not commit theft because he lacked the intent to permanently deprive.

Partially persuaded by the defense arguments, the jury found Woods guilty of robbery, but acquitted him of burglary. On the prosecution's motion, the lesser offense of petty theft with a prior was dismissed. The court found true enhancement allegations for a prior prison term, a serious felony prior conviction, and a strike prior conviction. The

trial court dismissed the prison prior and the strike prior, and sentenced Woods to seven years in prison (two years for the robbery and five years for the serious felony prior).

DISCUSSION

I. References to Criminal Background

Woods asserts the trial court abused its discretion and violated his federal constitutional right to a fair trial by denying his motion for a mistrial based on the statements of two witnesses referencing his criminal background.

A. Background

Prior to trial, the prosecutor informed the court that the victim's initial statement about the incident had changed by the time of the preliminary hearing. To explain to the jury Workman's motive for changing his story, the prosecutor requested admission of Workman's statements that he had heard Woods could receive a 10-year sentence if convicted and he did not believe Woods's actions justified this punishment. Defense counsel objected, arguing that it was not proper for the jury to consider punishment. Defense counsel also pointed out that Woods faced much more than 10 years in custody, and it was prejudicial to provide the jury inaccurate information about his potential sentence. Agreeing with the defense arguments, the court ruled to exclude any reference to a potential sentence of 10 years. However, the court stated the prosecutor could ask Workman a general question as to whether he was concerned about the punishment faced by the defendant for his actions on the day of the offense.

During his trial testimony, Workman acknowledged that he did not want to testify against Woods and was only doing so because he was subpoenaed. In accordance with

the court's pretrial ruling, the prosecutor asked Workman if he had heard about any potential punishment in the case. Workman responded affirmatively. The prosecutor then asked Workman why he did not want to testify against Woods. Workman responded, "I don't feel that if it is what I [was] told as far as here, a third strike or --" The court interrupted his response, stating, "Excuse me. I'm striking the answer. The jury is to disregard it." Workman then stated that he did not want to testify if "the outcome would be anything more than a violation."

Later during Workman's testimony, defense counsel asked when was the last time Woods had seen the numerous bikes owned by Workman. Workman responded: "Right after I think after he was released." Defense counsel moved to strike the answer, and the court struck it and told the jury to disregard it.

After Workman's testimony, another reference to Wood's criminal history was made by Deputy Bona. At the beginning of her testimony, the prosecutor asked Bona what Workman told her at the scene. Bona responded: "[Workman] said . . . Woods [was] saying something about a female named Sara. He noticed he had a skateboard in his hand, and Mr. Workman said that he knew that Mr. Woods just got out of prison--"

Defense counsel objected and moved for a mistrial. Outside the presence of the jury, defense counsel argued that Woods's criminal record was inadmissible; Bona had just made reference to his criminal record; and it was not possible to "unring that bell." Defense counsel asserted that knowing that a person has been to prison "changes the way you look at that person" with regard to character. The prosecutor stated that he had told the witnesses not to mention anything about Woods's prior record, and argued that any

prejudice could be cured with an admonition. After reviewing the other testimonial references to Woods's criminal history, the trial court decided to question each juror individually about whether, with an admonition from the court, the juror could set aside the information about the defendant's criminal background.

The court then polled each juror outside the presence of the other jurors. Each juror stated that he or she could disregard the information. Explaining the reason for his affirmative response, Juror No. 1 stated, "The past is the past. . . . [¶] . . . It has no bearing on this, what he's done before." A couple of other jurors answered the court's question emphatically, stating "Absolutely" and "Without a doubt." Several jurors promised to advise the court if any juror brought up the prior criminal history information during deliberations.

One juror (Juror No. 6) elaborated at length about his reaction to the testimony, stating that it would be difficult not to consider the information since it was brought up three different times; if the court did not admonish the jury not to consider the information he would factor it in; but ultimately he could follow the court's instruction not to do so. When asked by defense counsel how the information would be a factor if the jury was not told to disregard it, Juror No. 6 stated that it would cause him to question whether the potential punishment fit the crime, explaining: "Well, in consideration to the first witness that said it was about three strikes, you know, would I think is this something that's worth making it a third strike? Does the punishment fit the crime? But in terms of, you know, what the deputy said in terms of him just coming out of jail, I don't think it should matter at all that he just came out of jail." Another juror (Alternate

Juror No. 1, who did not deliberate) expressed sentiments similar to those of Juror No. 6, stating that the information would affect her judgment because she did not think a person should be punished under the three strikes law for "breaking a window and borrowing a bike." However, when queried further, Alternate Juror No. 1 stated that although the information would be in the back of her mind, she could disregard it and refrain from using it when deciding the case.

After the jury was polled, defense counsel adhered to his position that a mistrial should be granted. Defense counsel asserted that there are certain things people will not forget even if they are told to forget them; the jurors would not be able to exclude the prison information from their minds; and that it was the kind of information that was going to consciously or unconsciously affect their decisionmaking process to the defendant's detriment. Defense counsel cited two instances when jurors had failed to follow the court's instructions. He noted that a juror asked the prosecutor for the time even though the court had just admonished the jurors not to speak to the attorneys, and jurors failed to wear their badges during the lunch break even though the court had told them to do so. Disagreeing with the defense position that a mistrial was warranted, the prosecutor argued that the jurors were forthright about their reactions and that each juror stated he or she could follow the court's admonition.

The court assessed that the jurors spoke honestly when they said they could put the information aside, and denied the mistrial motion. The court admonished the jury to disregard the testimony regarding the defendant's prior criminal record and to not consider the subject of penalty or punishment.

B. Analysis

We review a trial court's denial of a mistrial motion for abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 573.) A mistrial should be granted if the court is " 'apprised of prejudice that it judges incurable by admonition or instruction' [Citation]. 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' " (*Ibid.*)

Although exposing a jury to a defendant's prior criminality can prejudice the defendant's case (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580), an admonition to disregard the evidence can cure the prejudice. (*People v. Avila, supra*, 38 Cal.4th at p. 573 [court did not err in denying mistrial motion after admonishing jury not to consider testimony that defendant had recently been in prison]; *People v. Valdez* (2004) 32 Cal.4th 73, 123 [fleeting reference to jail could have been cured with admonition].) We presume the jury follows a trial court's admonition. (*People v. Avila, supra*, 38 Cal.4th at p. 574.) However, if the reference to the defendant's prior criminality was " 'so outrageous or inherently prejudicial that an admonition could not have cured it,' " the mistrial motion should be granted. (*Valdez, supra*, 32 Cal.4th at p. 123.)

Although there were three references to Woods's prior criminality, the statements were brief and promptly addressed by the trial court with the jury. All of the jurors told the court they could follow the court's admonition to disregard the references. We defer to the trial court's assessment that the jurors spoke candidly with the court about their ability to disregard the information. Moreover, the two jurors who initially expressed

some hesitation about this indicated that the defendant's prior criminality might cause them to favor the defense because—consistent with the victim's view—they questioned whether the type of conduct involved in the case warranted elevated punishment. Thus, the record supports that the improper references may have benefited the defendant in the minds of some jurors. These factors support the trial court's conclusion that an admonition could cure any prejudice.

The trial court's denial of the mistrial motion is also supported by the ultimate outcome of the trial. The fact that the jurors acquitted Woods of burglary reflects that they carefully reviewed the evidence to determine if he was guilty of each of the charged offenses, and that they did not allow their verdict to be influenced by improper considerations of his character based on prior criminality.

Woods argues that the mistrial should have been granted because his "prior criminal record and the punishment he faced was a central underlying theme throughout his trial." He asserts his federal constitutional right to a fair trial was violated because the prior criminality references "permeated" the trial given that two of the three prosecution witnesses made the improper statements, and the trial testimony was presented in a single day. We are not persuaded. To the extent his prior criminality was a theme underlying the trial, this was because the victim did *not* want the defendant to be found guilty as charged given the potential punishment the defendant was facing based on his prior record. Further, even though the trial was short, the record does not show that the issue of Woods's prior record dominated the trial in a manner that might have caused the jury to ignore the court's admonition to disregard the information. The court took measures to

alleviate any prejudicial effect by polling each juror and then admonishing them to disregard the testimony about the defendant's prior criminal record. After this, trial testimony resumed, followed by instructions and closing arguments, with no further reference to the issue of prior criminality.

Woods asserts that the error was compounded because the prosecutor "encouraged the jury during closing argument to take punishment into consideration for the purpose of evaluating Mr. Workman's testimony." The prosecutor's argument was made to refute Workman's trial testimony that he was not scared during the incident, by pointing to the evidence that Workman had a "motive to change his story" because "he heard some sort of thing about punishment. And he decided, you know what, that punishment, I believe, doesn't fit the crime." The prosecutor's argument did not refer to Woods's prior criminality because it made no reference to elevated punishment arising from a prior record. Rather, the argument merely made a general reference to punishment, as permitted by the trial court's pretrial ruling. Further, the argument was designed to challenge the veracity of Workman's testimony supporting a conclusion that Woods did *not* commit the offenses charged by the prosecution. Thus, the reference to punishment was not presented to the jury as "bad character" evidence, but rather to evaluate whether to credit a version of the incident that inured to the defense benefit.

Finally, Woods contends his case is comparable to *Marshall v. United States* (1959) 360 U.S. 310, where the court ordered a new trial because of juror exposure to information about the defendant's prior criminal conduct. In *Marshall*, the defendant was charged with unlawfully dispensing drugs to an undercover government agent. The

defendant raised the defense of entrapment. The trial court excluded evidence that the defendant had previously practiced medicine without a license, which evidence had been proffered by the government to refute the entrapment defense. However, several jurors read newspaper articles discussing this prior misconduct. (*Id.* at pp. 310-312.) The United States Supreme Court reversed the judgment even though the trial court had polled the jurors and concluded there was no prejudice because the jurors stated they would not be influenced by the news articles. (*Id.* at pp. 312-313.)

In *Marshall*, the improper information received by the jurors could have substantially undermined the defendant's entrapment defense. No such circumstances are present here. The references to Woods's prior criminality provided no information about the nature of his prior convictions. Thus, although the improper statements were general character evidence potentially adverse to the defendant, they did not have any direct bearing on the disputed factual issues underlying the robbery charge—i.e., whether he used force or fear to take the property and intended to permanently deprive the victim of the property. Because of the distinctive circumstances, the *Marshall* holding does not persuade us that a new trial is required here. (See *Murphy v. Florida* (1975) 421 U.S. 794, 797-799 [*Marshall* does not establish constitutional rule that jury's exposure to defendant's prior criminal record creates presumption of prejudice; rather, totality of circumstances must be examined to determine if trial was fair].)

Woods has not shown that the court's denial of his mistrial motion was an abuse of discretion or violated his federal constitutional right to a fair trial.

II. *Intent to Permanently Deprive*

Woods contends the evidence does not support a finding that he had the intent to permanently deprive Workman of the bicycle.

In evaluating a challenge to the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) We presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*Ibid.*) If the circumstances reasonably justify the jury's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*Id.* at p. 358.)

Theft-related offenses, including robbery, require the specific intent to permanently deprive the victim of his or her property. (*People v. Mumm* (2002) 98 Cal.App.4th 812, 817.) "[I]ntent is inherently difficult to prove by direct evidence. Therefore, the act itself, together with its surrounding circumstances must generally form the basis from which the intent of the actor may legitimately be inferred.'" (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099.)

If the defendant takes property without the owner's consent but without the intent to permanently deprive, the conduct may be a trespass but it is not theft. (*People v. Davis* (1998) 19 Cal.4th 301, 305, 307 [it is not larceny "for a youth to take and hide another's bicycle to 'get even' for being teased, if he intends to return it the following day"; *People v. Brown* (1894) 105 Cal. 66, 69.]) However, the phrase "intent to permanently deprive"

is not intended literally, but is merely a shorthand way of describing the intent to steal. (*People v. Avery* (2002) 27 Cal.4th 49, 55.) For example, the intent to permanently deprive can arise when the defendant asserts control over the property in a manner that creates a substantial risk of permanent loss. (*People v. Davis, supra*, 19 Cal.4th at p. 309; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1446; *People v. Mumm, supra*, 98 Cal.App.4th at p. 819.) Similarly, the intent element is satisfied "by the intent to deprive temporarily but for an unreasonable time so as to deprive the [owner] of a major portion of its value or enjoyment." (*Avery, supra*, 27 Cal.4th at p. 58.) That is, larcenous intent exists if the defendant "'intend[s] to deprive the owner of possession of his property either permanently or for an unreasonable length of time, or intend[s] to use it in such a way that the owner will probably be thus deprived of his property.'" (*Id.* at p. 56.)

Here, the record shows that Woods took the bike even though Workman explicitly told him not to do so, and there is no indication that Woods thereafter made any effort to return the bike to Workman. Woods's choice to ignore the owner's protests and to do nothing to return the property reasonably supports an inference that Woods did not intend to return the property. Although Workman was fortunate enough to find Woods's parents and to secure the return of his bike, there was no assurance he would have been able to do this. And, the jury could reasonably infer that if Workman had not made an effort to find his property, Woods would have kept it indefinitely. The record supports a finding that Woods intended to handle the bicycle in a manner that created a substantial risk of permanent or unreasonably-long loss.

Woods asserts the jury's verdict cannot be sustained given the evidence that he had borrowed bikes from Workman in the past and either returned them to Workman or placed them in a location where Workman could find them. The contention is unavailing. There was no showing that on these other occasions Workman told Woods not to take the bike. The past instances of borrowing did not compel a finding that Woods merely borrowed the bike when he took it over the owner's protest and subsequently made no effort to return it.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.